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State v. Galvan Appellant's Reply Brief Dckt. 40223

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NOS. 40223 & 40224
)	
v.)	BONNEVILLE COUNTY
)	NOS. CR 2012-128 & CR 2012-3216
)	
RAFAEL GALVAN,)	REPLY BRIEF
)	
Defendant-Appellant.)	

COPY

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE

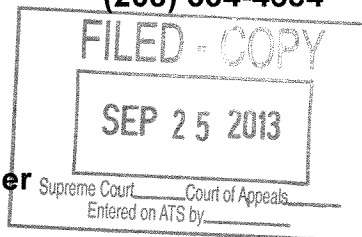
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STATEMENT OF THE CASE

Nature of the Case

In his Appellant's Brief, Mr. Galvan argued that the prosecutor violated both Mr. Galvan's Fifth and Fourteenth Amendment rights by arguing that the jury could use his post-*Miranda*¹ silence to infer evidence of his guilt.² This brief is necessary to respond to the State's assertion that Mr. Galvan waived his right to remain silent when he voluntarily provided statements to the police. In response, Mr. Galvan argues that the case law relied on by the State is distinguishable because the issue in those cases is whether a criminal suspect sufficiently invoked the Fifth Amendment right to remain silent as to require the police to terminate an interrogation. The State's authority does not deal with Mr. Galvan's specific argument that the use of his post-*Miranda* silence as evidence of his guilt violated his Fourteenth Amendment due process right to a fair trial.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Galvan's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

¹ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

² Mr. Galvan did not object to the prosecutors statement at trial and raised this issue for the first time on appeal under the fundamental error test set forth by the Idaho Supreme Court in *State v. Perry*, 150 Idaho 209 (Idaho 2010)

ISSUES

- 1) Did the prosecuting attorney violate Mr. Galvan's Fifth Amendment rights when, without objection, he elicited testimony as to Mr. Galvan's post-arrest, post-*Miranda* silence and commented on that silence in his closing argument?
- 2) Did the district court abuse its discretion when it imposed a unified sentence of ten years, with one and one-half years fixed, for aggravated assault and the deadly weapons enhancement and a concurrent sentence of four years, with one and one-half years fixed, for stalking in the first degree?³

³ Mr. Galvan is not addressing this issue in this brief.

ARGUMENT

I.

The Prosecutor Violated Mr. Galvan's Fifth Amendment Rights When, Without Objection, He Elicited Testimony As To Mr. Galvan's Post-Arrest, Post-Miranda Silence And Commented On That Silence In His Closing Argument

In its Respondent's Brief, the State argues that Mr. Galvan failed to establish the first prong of the fundamental error test pronounced in *Perry*, because Mr. Galvan waived his Fifth Amendment right to remain silent. (Respondent's Brief, pp.5-8.) In support of its assertion, the State relies on *Berghuis v. Thompkins*, 560 U.S. 370, ___, 130 S.Ct. 2250 (2010), for the proposition that a criminal suspect must unambiguously invoke the right to remain silent. While the State accurately states the holding from *Berghuis*, the case is distinguishable because the question presented was whether Thompkins' silence for a period of approximately three hours constituted a sufficient means to invoke his Fifth Amendment right and required the police to stop the interrogation. In other words, the case focused on the point in time when an interrogation must cease. According to the *Berghuis* Court that invocation must be unambiguous because police officers need a clear indication that they cannot ask the defendant any more questions.

However, *Berghuis* is not applicable in this case because Mr. Galvan is not seeking the suppression of statements. The question in this case is whether Mr. Galvan's decision to not answer a question during an interrogation can be subsequently used by the State during closing as evidence of his guilt. As stated in the Appellant's Brief, (Appellant's Brief, pp.7-10), Mr. Galvan's primary argument relies on *Doyle v. Ohio*, 426 U.S. 610 (1976), where the United States Supreme Court held that

silence in the wake of the *Miranda* warnings “may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.” *Id.* at. 617. The *Doyle* Court went on to hold that it would be “fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used” against him/her at trial. *Id.* at 618. As such, the *Berghuis* opinion is distinguishable from this case because *Berghuis* stands for the proposition that the Fifth Amendment right to remain silent must be unambiguously invoked, while the *Doyle* opinion stands for the proposition that post-*Miranda* silence is inherently ambiguous and due to that ambiguity the Fourteenth Amendment due process right to a fair trial would be violated if that silence was used against the defendant.

The State also cites to *Salinas v. Texas*, 133 S.Ct. 2174 (2013), for the proposition that the privilege against self-incrimination must be affirmatively invoked. (Respondent's Brief, p.8.) However, that case dealt with non-custodial interrogation, and the United State's Supreme Court expressly distinguished *Salinas* from *Miranda* and its progeny on that basis. *Id.* at 2180. In fact, the *Salinas* Court drew the very same distinction argued by Mr. Galvan. In that case, Salinas argued for the Court to adopt an exception to the Rule in *Berghuis* which requires a criminal defendant to unambiguously invoke the Fifth Amendment right to silence. The *Salinas* Court employed the following rationale in rejecting that exception:

Petitioner's proposed exception would also be very difficult to reconcile with *Berghuis v. Thompkins*, 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010). There, we held in the closely related context of post-*Miranda* silence that a defendant failed to invoke the privilege when he refused to respond to police questioning for 2 hours and 45 minutes. 560 U.S., at —, 130 S.Ct., at 2256–57, 2259–60. If the extended custodial

silence in that case did not invoke the privilege, then surely the momentary silence in this case did not do so either.

Petitioner and the dissent attempt to distinguish *Berghuis* by observing that it did not concern the admissibility of the defendant's silence but instead involved the admissibility of his subsequent statements. But regardless of whether prosecutors seek to use silence or a confession that follows, the logic of *Berghuis* applies with equal force: A suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege.^{FN3}

FN3. Petitioner is correct that *due process* prohibits prosecutors from pointing to the fact that a defendant was silent after he heard *Miranda* warnings, *Doyle v. Ohio*, 426 U.S. 610, 617–618, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), but that rule does not apply where a suspect has not received the warnings' implicit promise that any silence will not be used against him,^[4] *Jenkins v. Anderson*, 447 U.S. 231, 240, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).

Id. at 2182. (citation omitted) (original emphasis). According to the State's own authority, the *Berghuis* opinion's requirement that a defendant unambiguously invoke the right to remain silent is distinguishable from this case because that invocation requirement deals with a direct Fifth Amendment violation and not the derivative Fourteenth Amendment due process violation claimed by Mr. Galvan.

The State also argues that Mr. Galvan waived his Fifth Amendment right to remain silent when he began answering questions proffered by law enforcement. (Respondent's Brief, pp.6.) Contrary to the State's position, the foregoing case law does not require a defendant to affirmatively invoke the Fifth Amendment right to remain silent in order for the defendant to argue that use of post-custody, post-*Miranda* silence violated his/her Fourteenth Amendment right to a fair trial. This position comports with

⁴ However, the Idaho Supreme Court has held that, in Idaho, "a defendant's right to remain silent attaches upon custody, not arrest or interrogation, and thus a prosecutor may not use any post-custody silence to infer guilt in its case-in-chief." *State v. Ellington*, 151 Idaho 53, 60 (2011).

the *Doyle* holding which forbids the State's use of post-*Miranda* silence because it is inherently ambiguous as to its meaning and it is, therefore, inherently unfair to use it to infer guilt. While Mr. Galvan is not aware of any Idaho case law directly on point,⁵ the Tenth Circuit has held that when a defendant answers some questions and refuses to answer others, or in other words is partially silent, this "partial silence does not preclude him from claiming a violation of his due process rights under *Doyle*." *U.S. v. Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993). This is consistent with other Idaho case law which precludes the use of silence at trial unless that State introduces it for the limited purposes of impeachment. *See Ellington, supra*; *See also State v. Dougherty*, 142 Idaho 1 (Ct. App. 2005).

In sum, the State's authority is inapposite because it deals with the question of whether a defendant sufficiently invoked the Fifth Amendment right to remain silent as to require the police to cease an interrogation. Mr. Galvan is arguing that there is flat prohibition against using a defendant's post-custody silence for the purpose of inferring guilt based on a Fourteen Amendment due process claim which is derived from the Fifth Amendment right to remain silent.

⁵ According to the State, *State v. Doe*, 137 Idaho 519, 524-525 (2002), stands for the proposition "reinvocation of Miranda rights after waiver must be 'clear and ambiguous.'" (Respondent's Brief, p.7.) However, that case dealt with the questions of whether a juvenile actually waived his right to silence and whether, after speaking with the police on a few occasions, his mother's statement "the *Miranda* rights state he had a right to [an attorney]," was an unambiguous request by his mother for an attorney. *Id.* Contrary to the State's characterization of the holding in *Doe*, that case does not deal with the question of whether a defendant's decision to refuse to answer a specific question proffered by law enforcement after *Miranda* warnings can be subsequently introduced at trial as evidence of guilt. If fact, *Doe* makes no reference to *Doyle* or due process because it is a case dealing solely with the Fifth Amendment not a post-*Miranda* use of silence due process issue. As such, the State's reliance on *Doe* is misplaced.

CONCLUSION

Mr. Galvan respectfully requests that this Court vacate his judgment of conviction, and remand this matter to the district court for a new trial. Alternatively, Mr. Galvan respectfully requests that this Court reduce the indeterminate portions of his sentences.

DATED this 25th day of September, 2013.

A handwritten signature in black ink, appearing to read 'Shawn F. Wilkerson', is written above a horizontal line.

SHAWN F. WILKERSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of September, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

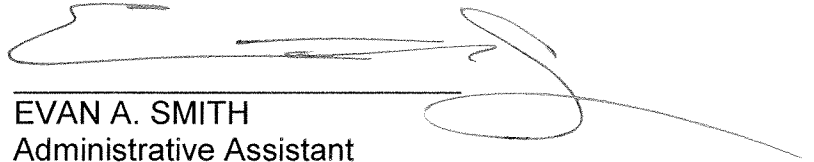
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DISTRICT COURT JUDGE
E-MAILED BRIEF

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